DAVID M. MILLER

IBLA 74-96 Decided April 26, 1974

Appeal from decision of the California State Office, Bureau of Land Management, requiring an up-to-date application and first year's rent for sodium prospecting permit application LA-0164308.

Affirmed as modified.

Administrative Practice--Administrative Procedure: Decisions--Applications and Entries: Filing--Applications and Entries: Priority--Mineral Lands: Prospecting Permits--Mineral Leasing Act: Generally--Sodium Leases and Permits: Generally

> The filing of an application for a lease or prospecting permit under the Mineral Leasing Act creates no vested rights in an applicant, only a priority of filing. After notice from the Bureau of Land Management, an applicant must comply with regulations promulgated after the application was filed in order to maintain the priority of filing and to receive the lease or permit. It is not improper for the Bureau to require such compliance of a sodium prospecting permit applicant before further processing the application on its merits.

APPEARANCES: H. Byron Mock, Esq., of Mock, Shearer and Carling, Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

David M. Miller has appealed from a decision dated July 11, 1973, of the Chief, Branch of Lands and Minerals Operations, California State Office, Bureau of Land Management (BLM), at Sacramento, concerning sodium prospecting permit application LA-0164308. The decision required that a current application form, with description of the land in accordance with a plat of survey approved July 30,

1971, and advance payment for the first year rental be filed within 30 days or the application would be rejected without further notice.

Appellant's sodium prospecting permit application LA-0164308 was filed May 25, 1959, for then unsurveyed lands in the Koehn Dry Lake bed, T. 30 S., R. 38 E., M.D.M., Kern County, California. In 1960, action on the application was informally suspended pending disposition of a partially conflicting sodium preference right lease application. No formal action was taken on the application until after the transfer of records to the BLM's State Office at Sacramento when the decision being appealed issued. The record does not reveal other reasons for the delay in adjudicating the application.

Appellant objects to the BLM's decision for a number of reasons, some of which are immaterial. 1/ Other reasons simply draw unwarranted conclusions from the language of the decision while ignoring other language and the essential thrust of the decision in requiring submission of new application forms and advance rental payment. Although the decision stated the application "is defective on its face," it did not hold that it was defective when filed, as appellant contends. The decision clearly indicated that the requirements of advance rental and submission on a form approved by the Director are due to regulations promulgated since the application was filed. To remove any doubt in this matter, the decision below is clarified to show that an application will be rejected as defective for failure to comply with current regulatory requirements only after proper notice of those requirements and an opportunity to comply with them. Richard M. Ferguson, A-30493 (March 14, 1966); see 43 CFR 3511.2-4(b).

The effect of the BLM decision was to give such notice of the new requirements and to require compliance with them or to subject the application to rejection without further notice if compliance was not made.

Appellant criticizes this procedure and the delay in adjudicating this application, but requests that further proceedings be stayed, and "consolidated with the other permit applications, the lease, and action under U.S. v. Long Beach Salt Co., Civil No. F-686, U.S.D.C. ED of Calif." Although appellant states that this application is "part of the complex" involved in that litigation,

1/ For example, he chides the Bureau for suggesting he might wish to withdraw the application because no inquiries about the application had been made for ten years. The decision did not require him to withdraw the application, as he insinuates, but only to conform the application to current requirements.

he in no way indicates how adjudication of the application is affected thereby.

There are only two essential issues involved in this case. The first is whether it was proper for the BLM to give notice of requirements imposed by the regulations after the application was originally filed and to require that such requirements be met before any further adjudicative action is taken on the application. The answer to this is yes. While appellant objects to this procedure, the objections are not pertinent or valid.

It is well established that the filing of an application for a lease or prospecting permit under the Mineral Leasing Act, 30 U.S.C. § 181 et seq. (1970), creates no vested rights in an applicant, only a priority of filing. If the application was proper when filed, the applicant's priority is preserved pending the outcome of an appeal objecting to imposition of newly imposed requirements. Richard M. Ferguson, supra. After notice, however, an applicant must comply with regulations promulgated after the application was filed in order to maintain the priority of filing and to receive a lease or permit. Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971), affirming Billy Stewart, NM 4200, etc. (approved by the Secretary of the Interior May 2, 1969); Larry Sakin, 11 IBLA 310 (1973). While Hannifin dealt with an application for a sulphur lease, there is nothing in the statute or regulations that supports a distinction between types of minerals or between applications for leases and permits on the issue of compliance with regulations adopted after the filing of an offer. E.g., Larry Sakin, supra (sulphur prospecting permit); Clarence E. Felix, A-30197 (January 7, 1965) (coal prospecting permit); Roy W. Swenson, 67 I.D. 448 (1960) (potassium prospecting permit); Joseph C. Sampson, 52 I.D. 637 (1929) (oil and gas prospecting permit). Cf. Miller v. Udall, 317 F.2d 573 (D.C. Cir. 1963) (oil and gas lease).

Recognizing the force of Sakin and related cases, appellant urges that we distinguish between the refusal to issue a permit until the offeror complies with the regulations and the refusal to process an application until the offeror complies, which it is asserted happened here. We can see no support in the law, regulations or BLM procedures related to mineral leasing for the proposed distinction. See 43 CFR 3511.2-4.

The delay in processing the application does not obviate the necessity for compliance by the applicant with the new requirements. The authority of Departmental employees to require such compliance is not lost by "failure to act, or delays in the performance of their duties." 43 CFR 1810.3(a).

The next issue relates to appellant's request for "consolidation" and a stay in further processing. The request to "consolidate" has no supportive basis.

Although appellant alludes to BLM records covering related matters, he has not referred to specific matters which would warrant suspending complete adjudicative action on his application. He has referred to a pending lawsuit but has failed to particularize why or how the application might be affected thereby. The appeal does not set forth any clear reasons for staying any further adjudicative action on the application. In part appellant may be requesting that he be allowed to meet the requirements of the BLM decision after this appeal is resolved. However, nothing in the appeal affords any reason for not requiring the applicant, in order to maintain the application's priority date of filing, to submit the first year's rental and to file a new application meeting the requirements of the current regulations.

Appellant is allowed 30 days from receipt of this decision within which to transmit to the California State Office, BLM, the required rental and an up-to- date application with a proper land description, as set forth in the Bureau's decision. Appellant has been given ample notice of the necessity to conform the application to changes in the regulations, and to describe certain land in accordance with a survey approved since the application was filed. Therefore, if appellant fails to do so, the application shall be considered rejected for failure to meet the requirements of the current regulations. If appellant submits an up-to-date and proper application with first-year rental, further adjudication of the application on its merits may proceed.

This decision is without prejudice to the appellant to file clear, precise reasons and supportive information with the BLM to show that the lawsuit or other matter might directly affect the status of lands within the application or otherwise establish a reason which would preclude the BLM from issuing the permit. If the BLM proposes to reject the application or to issue the permit in whole or in part for reasons unrelated to other proceedings and which would not be mooted by a determination in another proceeding, there would be no reason to suspend further adjudicative action. A suspension of the application in whole or in part would be warranted only if the applicant could clearly show that the outcome of the lawsuit or administrative action with regard to other matters would directly affect the approval or rejection of the application.

The decision below is modified to conform to this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Joan B. Thompson
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Douglas E. Henriques
Administrative Judge